Supreme Court, U.S.
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No. 08-672

IN THE

Supreme Court of the United States

EQUITY IN ATHLETICS, INC.,
PETITIONER,

v.

DEPARTMENT OF EDUCATION, *ET AL.*,
RESPONDENTS.

ON PETITION FOR WRIT OF *CERTIORARI* TO THE
U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Equity in Athletics, Inc. ("EIA") respectfully files this reply brief in response to the opposition filed by the Department of Education ("DOE"). The respondents associated with James Madison University ("JMU") waived its opposition.

I. FOURTH CIRCUIT CONFLICTS WITH THIS COURT ON TITLE IX PRECLUSION

By suggesting that JMU's attempt to comply with federal "guidance" makes "impermissible" EIA's challenge to the constitutionality of JMU's actions, App. 12a (quoting *Kelley v. Bd. of Trs.*, 35 F.3d 265, 272 (7th Cir. 1994)), the Fourth Circuit found Title IX to preempt constitutional review, both under §1983 and under §1331 and *Ex parte Young*.[1] Because this Court now has held that Title IX does not preempt constitutional review under §1983, *Fitzgerald v. Barnstable Sch. Comm.*, 129 S.Ct. 788, 795-96 (2009), the Fourth Circuit's "impermissible collateral attack" holding cannot stand.

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[1] "[T]wo [post-Civil War] statutes, together, after 1908, with the decision in *Ex parte Young*, established the modern framework for federal protection of constitutional rights from state interference." *Perez v. Ledesma*, 401 U.S. 82, 106-07 (1971). First, the Civil Rights Act of 1871, 17 Stat. 13, provided what now are 42 U.S.C. §1983 and 28 U.S.C. §1343(3). *Id.* Second, the Judiciary Act of 1875, 18 Stat. 470, provided what now is 28 U.S.C. §1331. *Id.*

DOE argues that the Fourth Circuit meant "impermissible" in the sense that "[JMU] could not be held liable for doing what Title IX validly permits." DOE Opp'n, at 9. That is neither the definition of "impermissible" nor what the Seventh Circuit meant by the term. *See Kelley*, 35 F.3d at 272 (citing *Milwaukee County Pavers Ass'n v. Fiedler*, 922 F.2d 419, 424 (7th Cir. 1991)). In *Fiedler*, the Seventh Circuit meant that a State's reverse discrimination in reliance on concededly *valid* federal program was immune to collateral attack. *Fiedler*, 922 F.2d at 424-25. Similarly, in *Fiedler*, it was equally clear that State action outside the federal program was open to constitutional attack. *Id.* Here, EIA does not concede the validity of the federal program and argues that JMU acted outside that program: there is nothing either impermissible or collateral in EIA's attack.

In *Kelley*, by contrast, the Seventh Circuit went well beyond its cited authority (*Fiedler*) and held that as-applied challenges were impermissible, based only on that Court's rejection of a *facial* challenge to the federal program. *Kelley*, 35 F.3d at 272. As EIA explains and DOE does not rebut, the fact that a federal program is not *facially* unconstitutional does not mean that that program is constitutional *as applied*. Pet. at 12-18, 33-34; *I.N.S. v. Nat'l Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 188 (1991) ("[t]hat the regulation may be invalid as applied... does not mean that the regulation is facially invalid"). This Court's *Fitzgerald* decision requires reversing the Fourth and Seventh Circuits' impermissible-collateral-attack doctrine.

II. FOURTH CIRCUIT APPLIES THE WRONG STANDARD FOR INTERIM RELIEF

DOE does not (and cannot) dispute that the Fourth Circuit's *Blackwelder* test "contravene[s] Supreme Court precedents by overvaluing the inquiry into the relative equities." Pet. at 23 (quoting *Safety-Kleen, Inc. v. Wyche,* 274 F.3d 846, 868 (4th Cir. 2001) (Luttig, J., concurring)). Instead, DOE argues that EIA "can hardly be heard to complain: it could not satisfy that allegedly laxer standard." DOE Opp'n, at 10-11. As Judge Luttig recognized, however, the problem is not whether the resulting standard is more lenient or more strict (it is both); the problem is that the Fourth Circuit test overvalues the weighing of relative equities. That is something that this Court can and should correct.

DOE also fails to provide this Court a candid assessment of the split in the circuits over whether a plaintiff's delay, standing alone, can negate entitlement to a preliminary injunction. *Compare, e.g.,* DOE Opp'n at 11 (citing cases) *with Ideal Indus., Inc. v. Gardner Bender, Inc.,* 612 F.2d 1018, 1025 (7th Cir. 1979) (analyzing whether delay lulled defendant into a false sense of security or caused defendant to act in reliance on the plaintiff's delay) *and BP Chem. Ltd. v. Formosa Chem. & Fibre Corp.,* 229 F.3d 254, 264 (3rd Cir. 2000) (plaintiff's good faith efforts to investigate an infringement and to determine how serious an infringement is does not preclude a finding of irreparable harm). The cases reveal one and arguably two distinct circuit splits.

First, as indicated, the lower courts are split on the extent to which a defendant must couple

plaintiff's delay with that delay's having lulled the defendant into a false sense of security or reliance. Sandra Edelman, *Delay in Filing Preliminary Injunction Motions: Update 2002,* 92 TRADEMARK REP. 647, 654-55 (2002); Thomas J. Speiss, III & Stephen M. Levine, *An Analysis of the Factors that Determine When and How to Resolve a Trademark Dispute,* 11 RICHMOND J. OF L. & TECH. 1, 57 & n.150 (2004) ("lack of uniformity among the various circuit courts as to the relevance of the defendant's prejudicial reliance continues to be shown in cases [recently] reported") (quoting Edelman, *supra*). Under the circumstances, JMU cannot claim that EIA's actions lulled it or occasioned any reasonable reliance on JMU's part that EIA would not seek interim relief.

Second, the lower courts also are split on whether to characterize the relief to defendants as laches or as something else. *Compare Quince Orchard Valley Citizens Ass'n, Inc. v. Hodel,* 872 F.2d 75 (4th Cir. 1989) ("a particular period of delay may not rise to the level of laches and thereby bar a permanent injunction, it may still indicate an absence of the kind of irreparable harm required to support a preliminary injunction") (interior quotations omitted) *with Gardner Bender,* 612 F.2d at 1025 (analyzing delay as laches and holding that "mere passage of time cannot constitute laches"). While this second split may merely restate the first, *see, e.g., Nat'l R.R. Passenger Corp. v. Morgan,* 536 U.S. 101, 122 (2002) (laches requires "lack of diligence by the party against whom the defense is asserted" and "prejudice to the party asserting the

defense"), it has independent relevance here.

It is uncontested that JMU planned to eliminate the ten teams for two years in unlawful secret meetings that violated Virginia's open-meeting laws. It is also uncontested that, during those two years, JMU recruited students to participate on the ten teams without disclosing their potential elimination. Under the circumstances, if the delay defense is laches, no court should hear JMU raise it: "he who comes into equity must come with clean hands," an equitable doctrine that "closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief" or "fraud or deceit as to the controversy in issue." *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 814-15 (1945) (interior quotations omitted); *Johnson v. Yellow Cab Transit Co.*, 321 U.S. 383, 387-88 (1944) (unclean hands can apply to defendants); Edward Fadeley, *The Clean-Hands Doctrine in Oregon*, 37 OR. L. REV. 160, 163 & nn.34-35 (1958) (although typically applied against plaintiffs, unclean hands also can deny defendants' reliance on equitable defenses); Pet. at 24. Here, JMU's unclean hands should deny resort to any equitable defense.

III. LEGAL ERRORS BELOW REQUIRE THIS COURT'S APPELLATE SUPERVISION

DOE rejects EIA's argument that the lower courts' unanimity requires this Court's supervision, DOE Opp'n, at 13, but offers little beyond that unanimity to rebut EIA's arguments, which those lower courts did not consider. EIA respectfully submits that only this Court can undo the circuits'

ossified, compounding misapplications of constitutional and administrative law. Without this Court's intervention, neither EIA's JMU members nor similarly situated plaintiffs anywhere (including EIA members at other schools) can protect their constitutional rights.

A. Appellate Review of Three-Part Test Requires Supervision

Without addressing EIA's argument that balance for balance's sake is not a legitimate government interest, DOE argues against importing the reasoning of this Court's race-discrimination cases into gender discrimination. *Compare* Pet. at 33-34 *with* DOE Opp'n, at 13 & n.5. DOE also ignores EIA's argument that the circuits are split on whether Congress intended Title IX as a strict-scrutiny statute, Pet. at 33, and that EIA members' First-Amendment injuries trigger strict scrutiny. Pet at 34. DOE does, of course, cite numerous cases that upheld the Three-Part Test, DOE Opp'n, at 12, which EIA distinguishes here.

Although eight appellate courts have found the Three-Part Test lawful by deferring to DOE *under Title IX*, they devoted surprisingly little thought on the Three-Part Test's *constitutionality*. What little thought they have devoted relies on superseded Court decisions or case-specific facts. Often, when women sought to enforce their regulatory "rights" under the Three-Part Test, the

Equal Protection Clause simply did not come up.[2] Even more often, appellate courts have expressly declined to address the Equal Protection Clause's application to the Three-Part Test.[3] Because "[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon,

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[2] *See, e.g., Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824 (10th Cir. 1993) (silent on constitutional issues); *Pederson v. Louisiana State Univ.*, 213 F.3d 858, 884 (5th Cir. 2000) (reaching only Title IX).

[3] *See, e.g., Miami Univ. Wrestling Club v. Miami Univ.*, 302 F.3d 608, 614 (6th Cir. 2002) ("Nothing in any version of the complaint can be construed as a direct [constitutional] challenge to either the law, the regulations or the Policy Interpretation"); *Chalenor v. Univ. of N.D.*, 291 F.3d 1042, 1049 (8th Cir. 2002) ("plaintiffs admit that they admit that they 'did not assert a constitutional violation' in the District Court..., so we need not decide the constitutional issue"); *Boulahanis v. Bd. of Regents*, 198 F.3d 633, 640 (7th Cir. 1999) ("availability of [Title IX] claim preempts the remedies available for sex discrimination under Section 1983"); *Kelley*, 35 F.3d at 272 ("plaintiffs' [constitutional challenge to school's cuts] is merely a collateral attack on the statute and regulations and is therefore impermissible"); *Williams v. Sch. Dist. of Bethlehem*, 998 F.2d 168, 176 (3rd Cir. 1993) (avoiding constitutional issue because "Congress intended to foreclose a right of action under section 1983").

are not to be considered as having been so decided as to constitute precedents," *Cooper Indus., Inc. v. Aviall Serv., Inc.*, 543 U.S. 157, 170 (2004) (*quoting Webster v. Fall*, 266 U.S. 507, 511 (1925)), the decisions cited in notes 2 and 3 cannot support the Three-Part Test's constitutionality. Only four decisions even remotely address the Three-Part Test's constitutionality.

First, the Sixth Circuit's *Horner* litigation involved an effort to establish a new interscholastic sport for girls. By denying relief under the Equal Protection Clause in *Horner v. Kentucky High Sch. Athletic Ass'n*, 43 F.3d 265 (6th Cir. 1995) ("*Horner I*"), but allowing it under the Three-Part Test in *Horner II*, the *Horner* litigation demonstrates that the Equal Protection Clause protects against only actions taken because of gender, *Horner I*, 43 F.3d at 276, whereas the regulations provide an affirmative "equal opportunity mandate," *Horner v. Kentucky High Sch. Athletic Ass'n*, 206 F.3d 685, 694 (6th Cir. 2000) ("*Horner II*"). In distinguishing between the regulatory equal-opportunity mandate and the constitutional equal-protection clause, the *Horner* litigation underscores the relevance of EIA's procedural fight over which definition of equal applies, the Three-Part Test or the 1975 regulations.

Second, the First Circuit's *Cohen* litigation and the Seventh Circuit's *Kelley* litigation assessed the Three-Part Test's facial constitutionality under the lesser scrutiny that *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547, 565-66 (1990), afforded to "benign classifications." *Cohen v. Brown Univ.*, 991 F.2d 888, 901 (1st Cir. 1993); *Kelley*, 35 F.3d at 272.

In *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 228 (1995), however, this Court overruled *Metro Broadcasting* to require the same scrutiny for all classifications. *Cf. Cohen v. Brown Univ.,* 101 F.3d 155, 170, 183 (1st Cir. 1996) (disregarding *Adarand* under the law of the case doctrine and because Brown had already been found guilty of discrimination). As such, *Cohen* and *Kelley* are unreliable on constitutional issues.

Third, the Ninth Circuit's *Neal* litigation involved a school operating under a consent decree for past gender discrimination.[4] *Neal v. Bd. of Trs.,* 198 F.3d 763, 765 (9th Cir. 1999), Indeed, Moreover, *Neal* technically avoided the constitutional merits, *Neal,* 198 F.3d at 772 (court would apply intermediate scrutiny "were we addressing the constitutional merits"). Instead, *Neal* merely "h[e]ld that the constitutional analysis contained [in *Kelley* and *Cohen*] persuasively disposes of any serious constitutional concerns" with the Three-Part Test as applied in that case. *Neal,* 198 F.3d at 772-73. In sum, *Neal* relies on *Kelley* and *Cohen* (which relied on the overruled *Metro Broadcasting*) and involved a school with a past finding of intentional

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[4] The circuits are split on whether intermediate scrutiny requires a showing of past discrimination by the entity involved or merely by society at large. *Compare, e.g., Ensley Branch, NAACP v. Seibels,* 31 F.3d 1548, 1580 (11th Cir. 1994) *with Conlin v. Blanchard,* 890 F.2d 811, 816 (6th Cir. 1989).

discrimination against women, which is inapposite.

B. Three-Part Test is Procedurally Invalid

DOE defends against EIA's procedural claims by arguing that interpretative guidelines do not require notice-and-comment rulemaking and Title IX's presidential-approval requirements have "been expressly rejected by other courts," DOE Opp'n, at 14-15 (citing Pet. 65a), by which DOE means two district-court opinions, one unpublished. Pet. 65a-66a. Significantly, like the courts below, DOE simply ignores EIA's argument that the Three-Part Test never took effect under the General Education Provisions Act. Pet. at 31-32.

On EIA's rulemaking argument, DOE offers only *dicta* from *Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930, 940 (D.C. Cir. 2004) ("*NWCA*"), a case in which the plaintiffs lacked standing. Because the plaintiffs lacked standing, the *NWCA* court's procedural views are not precedential. Pet. at 14 n.7; *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 665 (D.C. Cir. 1996) (*en banc*). Moreover, because those views conflict with the law of the D.C. Circuit, Pet. at 28 & n.12, they would not be precedential even if the *NWCA* plaintiffs had had standing. *Indep. Cmty. Bankers of Am. v. Bd. of Governors of Fed. Reserve Sys.*, 195 F.3d 28, 34 (D.C. Cir. 1999) (earlier-adopted panel decision controls because one three-judge panel cannot overrule another). DOE offers nothing to explain why the change from equal opportunity, based on interest, to equal participation, based on enrollment, escapes a required rulemaking.

On EIA's presidential-approval argument,

DOE offers two district court decisions that imagine a "guidance" exception to the requirements for rules and orders, without either recognizing that issuing non-rule guidance *is an order,* Pet. at 31, or addressing the numerous court decisions that find presidential approval required. Pet. at 30-31 & n.13.

C. Public Interest Favors Injunction

Although all parties agree that Title IX commitments bind JMU, the Fourth Circuit found the public interest to lie in JMU's "chart[ing its] own course," Pet. 14a, which DOE finds dispositive. DOE Opp'n, at 15. Unfortunately, because it accepts federal funds, JMU must chart its course from among those allowed by federal law. Even if it finds the Three-Part Test viable, this Court nonetheless must find that JMU's actions violate DOE's Title IX regime. Because JMU's course violates federal law, it has no right to chart its chosen course.

EIA has consistently argued that JMU's disproportionate elimination of male non-scholarship athletes without correspondingly either increasing female scholarships or decreasing male scholarships creates a "scholarship proportionality" gap that dwarfs the $500,000 that JMU had spent on the ten eliminated teams. Pl.'s Memorandum of Law in Support of Motion for Preliminary Injunction, at 14-15 n.7; Pl.'s Reply to JMU Defendants, at 19; Appellants' Opening Br., at 66; Appellant's Reply Br. at 36 n.10; Pet. at 36. No party and neither lower court disputed this argument; they ignored it.

Based on JMU's post-elimination Equity in Athletics Disclosure Act data provided to DOE,[5] JMU's student body was 39.13% male and 60.87% female (6,820 and 10,608, respectively), its athletic department was 37.12% male and 62.88% female (196 and 332, respectively), and it divided its scholarship dollars as 49.06% male and 50.94% female ($2,243,218 and $2,328,766, respectively). Under the Three-Part Test, men are now the underrepresented gender by 2.01%, and JMU could add a 17-member male team with men's remaining underrepresented by 0.05%. More importantly, women receive disproportionately fewer scholarship dollars, and JMU would need to add $1,313,000 in women's scholarships to bring the women's total within 1.00% of women's representation in the athletic department, as required by DOE. Given the algebraic interplay between non-scholarship male athletes added and JMU's scholarship-proportionality obligations, adding that 17-member male team would reduce to $1,025,000 JMU's scholarship gap, thereby providing $288,000 to fund the new team.

Because JMU's "charted course" is blatantly unlawful under JMU's and DOE's view of the law, and because the pre-elimination status quo complied

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[5] EIA will seek leave under Rule 32.3 to file the data, which are available on DOE's website at http://ope.ed.gov/athletics/GetOneInstitutionData.aspx (last visited February 20, 2009).

with JMU's and DOE's view of the law, EIA respectfully submits that the public interest cannot lie in allowing JMU to chart its current course.

D. Legal Error Constitutes Abuse of Discretion and Requires Correction

DOE cites the general rule that this Court awaits final judgments, DOE Opp'n, at 15, without disputing that legal error is an abuse of discretion with *de novo* appellate review. Pet. at 3. While "this [Court's] power would seldom be exercised before final judgment in the circuit court of appeals," "the question at what stage of the proceedings, and under what circumstances, the case should be required by certiorari or otherwise, to be sent up for review, is left to the discretion of this court, as the exigencies of each case may require." *American Constr. Co. v. Jacksonville, T. & K.W.R. Co.*, 148 U.S. 372, 385 (1893). Here, to correct legal error below, to resolve circuit splits on the proper standard for interim relief generally, and to exercise this Court's supervisory role in this important civil-rights arena, the exigencies of this case require this Court's review.

CONCLUSION

The petition for writ of *certiorari* should be granted.

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